

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
DAVID REVER**

Applicant

David Rever.
Brian J. Donnelly
Carl Starkey

For the Application

David D. Freishtat, Esquire
Anne Marie Vassallo, Esquire
Attorneys for the Applicant

*
*
*
*
*
*
*
*
*
*
*
*

Zoning Application No. G-874

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	Page No.
I. EXECUTIVE SUMMARY	2
II. STATEMENT OF THE CASE	3
III. FINDINGS OF FACT.....	4
A. Subject Property	4
B. Surrounding Area and Adjacent Development	7
C. Zoning and Land Use History	9
D. Proposed Use.....	9
E. The Master Plan.....	13
F. Public Facilities	15
G. Environment and Stormwater Management	17
H. Community Participation	20
IV. SUMMARY OF THE HEARING.....	20
V. ZONING ISSUES	28
A. The Purpose Clause and the Zone's Requirements.....	29
B. Compatibility.....	32
C. Public Interest.....	33
VI. CONCLUSIONS	36
VII. RECOMMENDATION.....	36

I. EXECUTIVE SUMMARY

Applicant:	David Rever
LMA No. & Date of Filing:	G-874, filed October 1, 2007
Zoning and Use Sought:	Zone: O-M Use: One small Medical/General Office Building
Current Zone and Use:	Zone: R-200 Current Use: One Single-Family House being used as a dental office and residence
Rezoning Method:	Optional Method - Schematic Dev. Plan with Binding Elements
Location:	13915 Old Columbia Pike, Silver Spring, Maryland
Applicable Master Plan:	1997 Fairland Master Plan
Area to be Rezoned:	29,893 square feet (0.68 acres).
Right-of-Way to be dedicated:	None; the lot is already subdivided
Lot Coverage Permitted:	60% maximum
Lot Coverage Proposed:	20% maximum, <u>by Binding Element</u>
Building Height Limits:	5 Stories or 60 feet
Building Height Proposed:	36 feet maximum, <u>by Binding Element</u>
Density Permitted in O-M Zone:	1.5 FAR
Density Proposed:	0.32 FAR maximum, <u>by Binding Element</u>
Green Space Required/Provided:	10% minimum / Provided: 55%
Setbacks from Street:	15 feet Required / 15 feet or more Provided
Setbacks from Other Lot Line:	12 feet Required / 12 feet and 30 feet Provided
Parking Required/Provided:	31 spaces Required / 31 spaces Provided
Traffic Issues:	None; PAMR does not apply due to dater of filing
Environmental Issues:	Small portion of Site is in the Environmental Overlay Zone, but actual drainage divide puts it outside the SPA, per DPS
Zoning Issues:	None; Project meets all requirements
Consistency with Master Plan:	Project is consistent with Objectives of the <i>Fairland Master Plan</i>
Neighborhood Response:	None, except the request for a privacy fence, agreed to by Applicant
Planning Board Recommends:	Approval
Technical Staff Recommends:	Approval
Hearing Examiner Recommends:	Approval

II. STATEMENT OF THE CASE

Local Map Amendment (LMA) Application No. G-874, filed on October 1, 2007, requests the reclassification from the R-200 Zone (Residential, one-family) to the O-M Zone (Office building, moderate intensity) of 29,893 square feet (0.68 acres) of land known as Lot 1 of the Rhodes Addition to Fairland Subdivision, located at 13915 Old Columbia Pike, Silver Spring, Maryland, in the 5th Election District. This Site is located on the east side of Old Columbia Pike, just north of Briggs Chaney Road, and the Tax Account Number is 05-00276026. If approved, the site will be developed with a 2-story, medical and general office building and a parking lot to serve the building.

The application was filed under the Optional Method authorized by Code § 59-H-2.5, which permits binding limitations with respect to land use, development standards and staging. Such limitations are shown on a Schematic Development Plan submitted with the application, and must be repeated in covenants to be filed in the county land records.

The zoning application was reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) who, in a report dated February 8, 2008, recommended approval of the rezoning request (Exhibit 22).¹ The Planning Board considered the application on February 21, 2008, and unanimously recommended approval based on the reasons set forth in the Technical Staff Report. The Board found “the development limitations of the Schematic Development Plan to be a more desirable form of development than would be accomplished under the maximum allowable standards of the O-M zone.” Exhibit 23.

A public hearing was noticed for, and conducted on, March 3, 2008. The Applicant was represented by attorneys David D. Freishtat, Esquire and Anne Marie Vassallo, Esquire, and they called three witnesses. There were no opposition witnesses, and the Application remains unopposed.

¹ The Technical Staff Report is quoted and paraphrased frequently herein.

The record was held open until March 14, 2008, to allow the Applicant to file minor modifications to his plans, and it closed as scheduled. It was reopened and closed again on April 1, 2008, to receive a supplemental Technical Staff report (Exhibit 34), as well as copies of plans with typographical corrections and copies of other documents filed by Applicant (Exhibits 33(a) – (i)).

This is not a complicated case, and the only issue is whether the proposed medical/general office use will be compatible with some nearby residential uses. Both the Technical Staff and the Planning Board found that it would be, and the Hearing Examiner agrees because the intensity of the use will be strictly limited by the binding elements. Moreover, the site is located along three major roads, and is directly across from a fire house and a shopping center, which render the immediate area more commercial/institutional than single-family residential, in spite of its current zoning.

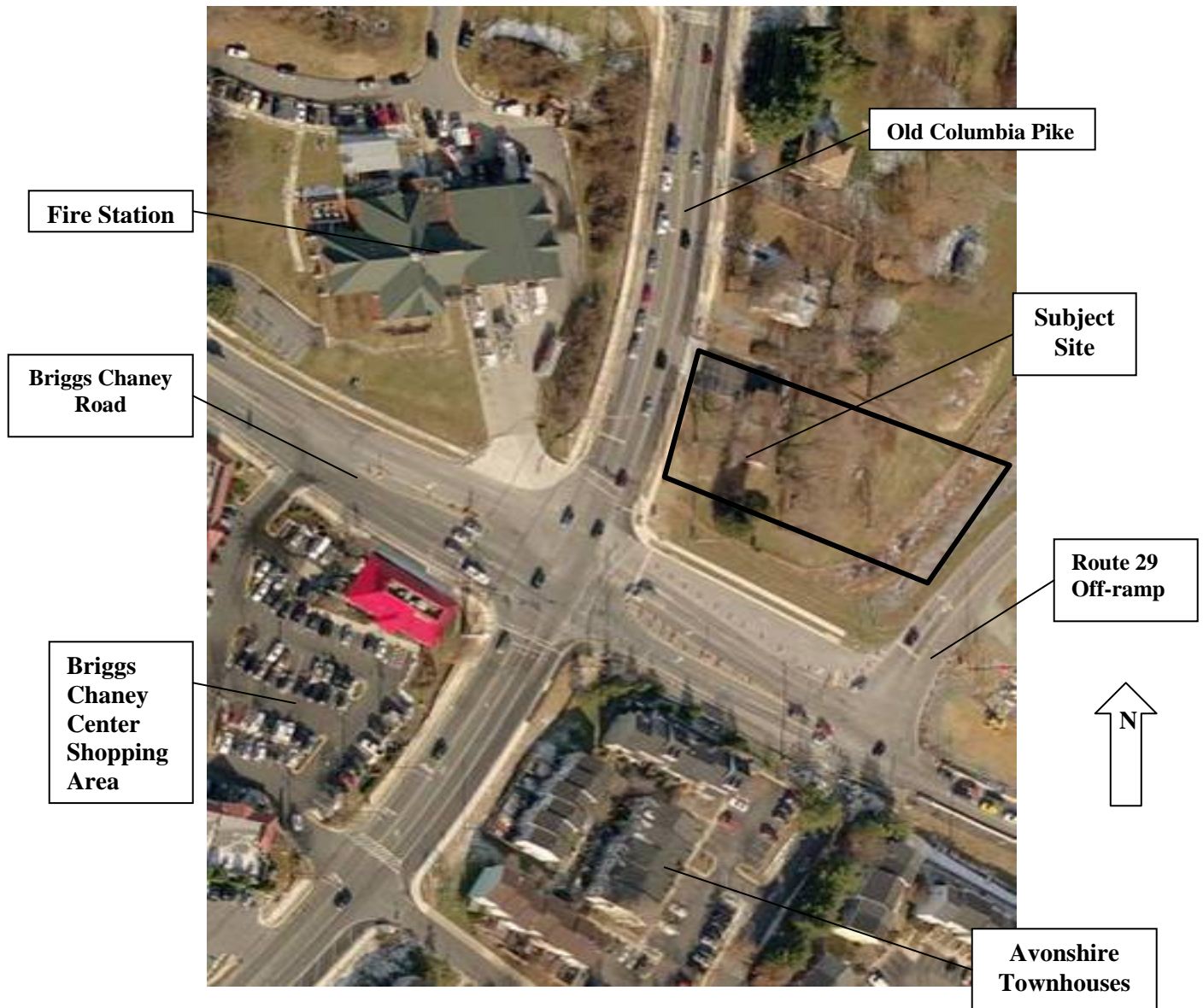
III. FINDINGS OF FACT

A. Subject Property

The subject property, 13915 Old Columbia Pike, Silver Spring, is a single lot (Lot 1 of the Rhodes Addition to Fairland Subdivision) with an area of 29,893 square feet (0.68 acres). The lot is rectangular in shape and is located on the northeast quadrant of the intersection of Old Columbia Pike and Briggs Chaney Road, immediately to the west of the Maryland Route 29 off ramp. Technical Staff reports that the property has approximately 107 feet of street frontage along Old Columbia Pike, and that a 1,435 square foot single-family home, with a concrete driveway, sits on the site. Old Columbia Pike is a two-lane residential primary street, with a sidewalk along the property frontage, and Briggs Chaney Road is a four-lane, divided, east-west arterial roadway.

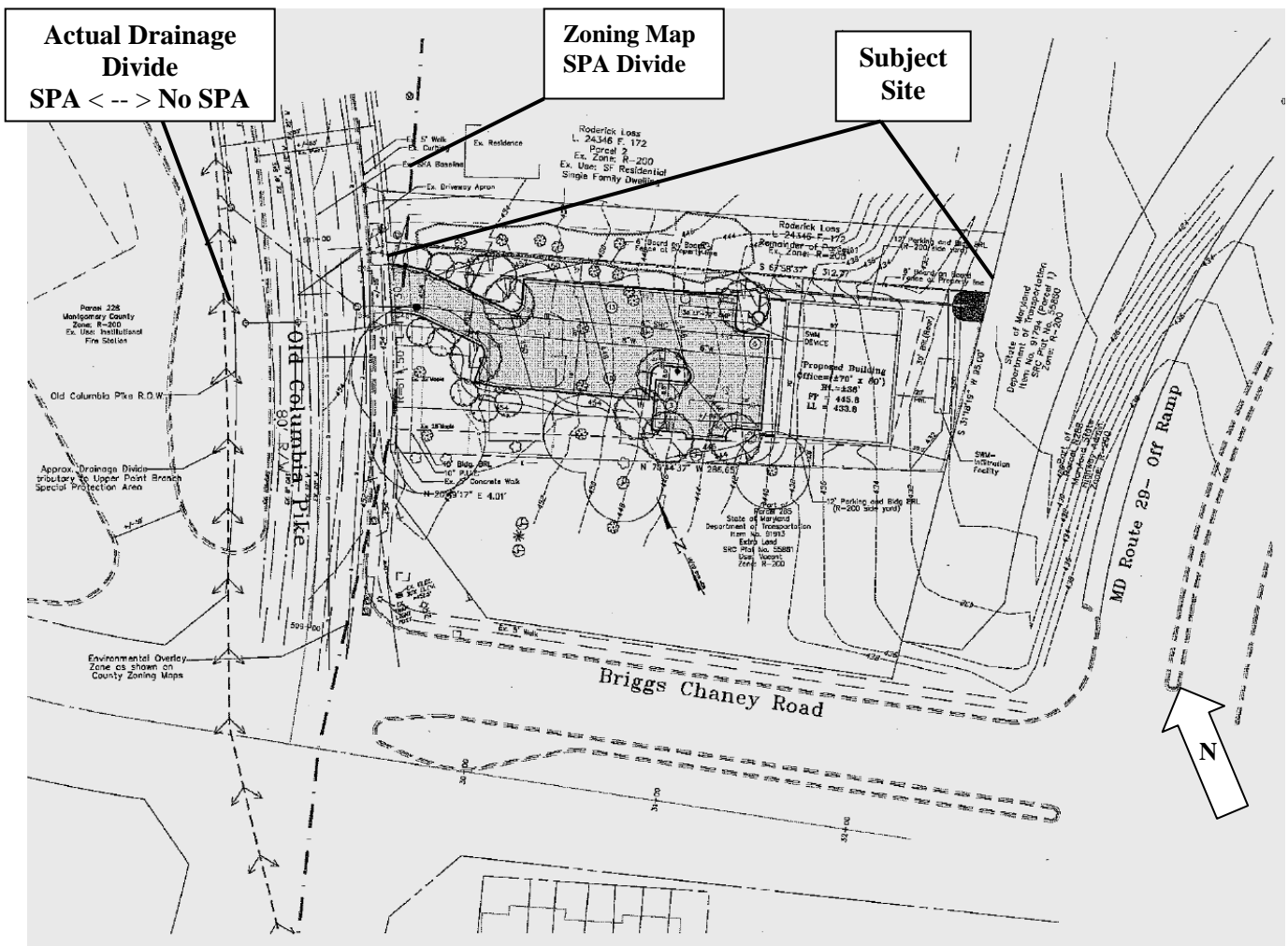
The topography of the site reflects an approximately 24-foot decrease in grade, from 454 feet above sea level at the property's Old Columbia Pike street frontage to 430 feet at the property's rear lot line. The home is now being used as a residence and a dental practice, and Applicant has "a

valid home occupation,” according to Technical Staff. Exhibit 22, p. 5. The general site layout and some of the surrounding uses may be seen in an aerial photograph from the Technical Staff report, which is reproduced below.



A small (525 square foot) triangular sliver of the northwest corner of the property is shown on the County Zoning Map as being within the Upper Paint Branch Environmental Overlay Zone (*i.e.*, within a Special Protection Area). However, the Department of Permitting Services (DPS) found that “no portion of the subject property is within the Upper Pant Branch Special Protection

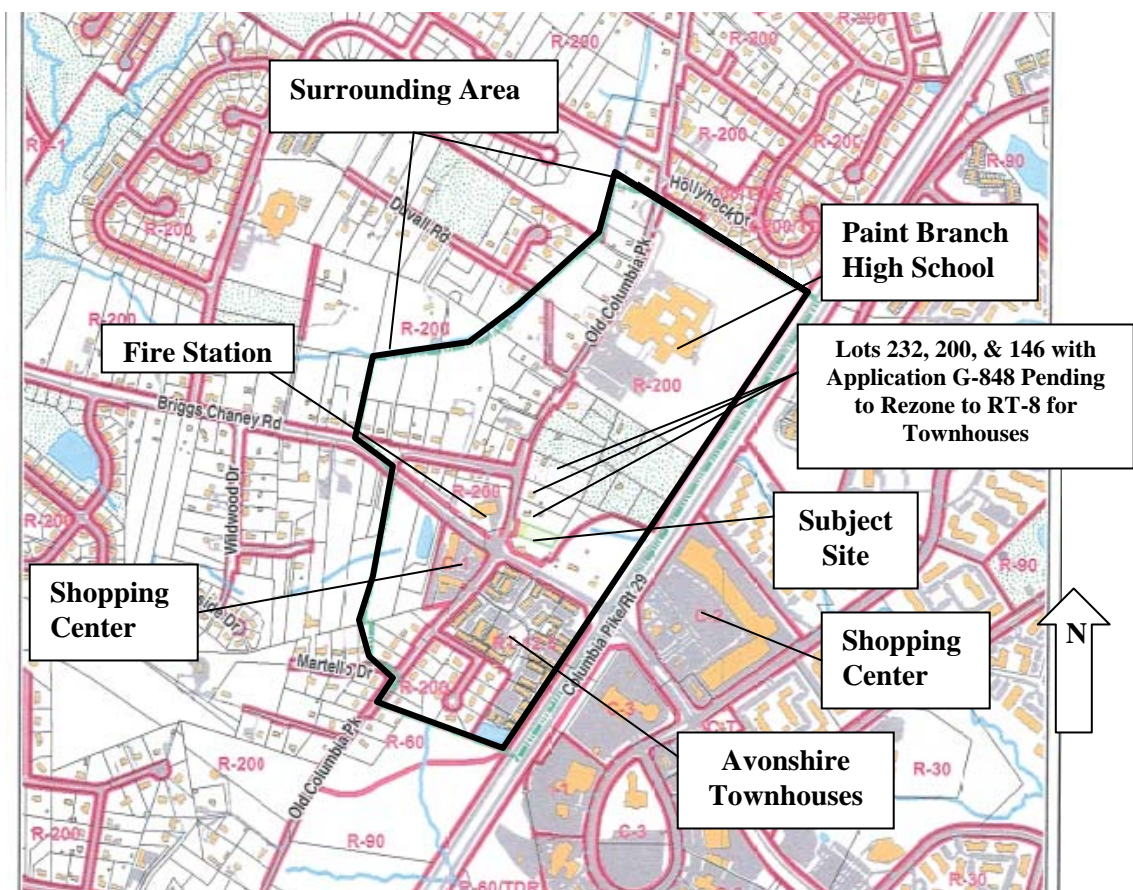
Area (SPA) . . . [because t]he entire property appears to drain away from the SPA.” Exhibit 31(j). Applicant’s land planner, Brian J. Donnelly, testified that the true delineation of the SPA is based on the actual drainage divide for the area, which is on the opposite side of Old Columbia Pike, not on the subject site. Tr. 28-30. The actual drainage divide is shown on the Schematic Development Plan (SDP) as a dark dashed line with dual arrows pointing down. It delineates the actual water flow into and away from the special protection area, as can be seen below. Exhibit 33(a).



Technical Staff reports that the site has no streams, wetlands, floodplains or forested areas, although there are three specimen trees on-site and two more specimen trees off-site, quite close to common property lines. Environmental issues will be discussed in Part III. G. of this report.

B. Surrounding Area and Adjacent Development

The O-M Zone is a floating zone, and evaluation of the zoning issues requires delineation of a surrounding area. In a floating zone application, the surrounding area is less rigidly defined than in a Euclidean zone application. In general, the defined surrounding area takes into account those areas which are most directly affected by the proposed development, and any special study areas which may have been defined by a master or sector plan. In this case, the surrounding area was designated by Technical Staff as bounded by Hollyhock Drive and the northern property line of Paint Branch High School to the north,² Columbia Pike (US 29) to the east, Martello Drive to the south, and the Upper Paint Branch Stream Valley Buffer to the west. It is shown below:



² The text definition of the surrounding area in the Technical Staff report (Exhibit 22, p. 6) differs on the northern end from the definition as shown on the Surrounding Area Map appended as Attachment 1 to the Technical Staff report. The Hearing Examiner confirmed that the text was in error, and therefore the definition of surrounding area shown on the Map is the one adopted here.

Applicant's land use expert, Brian J. Donnelly, differed only as to the western boundary for the defined surrounding area. Mr. Donnelly mistakenly thought that Technical Staff's definition of the surrounding area went only as far west as Old Columbia Pike, as shown on Applicant's Exhibit 26 by a dashed/dotted line. He felt that it should include the fire station and shopping center to the west of Old Columbia Pike, as shown on Exhibit 26 with a dashed line. Tr. 22-23. Actually, Technical Staff's surrounding area definition goes further to the west than Applicant's and does include both the fire station and the shopping center in question. The Hearing Examiner accepts Technical Staff's definition of the surrounding area, as shown in the map reproduced on the previous page.

As noted by the Technical Staff, the land use and zoning pattern of the defined surrounding area reflect a mix of residential, institutional and commercial uses. Abutting the subject property to the north are single-family detached homes in the R-200 Zone, although it should be noted that another rezoning application (G-848, filed by Olympus Real Estate Group, LLC) is pending, and it seeks to rezone the three lots immediately to the north (Lots 232, 200, & 146) to allow townhouse development (RT-8). Further north, approximately 1000 feet from the subject property, is Paint Branch High School.³ To the immediate west, across Old Columbia Pike, is the Burtonsville Fire Station. Further to the west are single family homes in the R-200 Zone. Diagonally to the southwest, across the intersection of Briggs Chaney Road and Old Columbia Pike, is a commercial shopping center in the C-1 Zone that contains, *inter alia*, a Pizza Hut restaurant, a 7-11 convenience store, and a beer & wine shop. To the immediate south of the subject property is a portion of a vacant lot held

³ Applicant's counsel indicated at the hearing that there may be plans for the expansion of Paint Branch High School to the south. He stated that Parcel 140 and Parcel 75, which abut the school to the south, are owned by the M-NCPPC, and he learned that the Planning Commission has received a mandatory referral to consider a possible expansion onto those lots. Tr. 23-24.

by the State of Maryland (Department of Transportation)⁴, and further south, across Briggs Chaney Road, lies the Avonshire community, an existing townhouse development in the RT-12.5 zone.

C. Zoning and Land Use History

The subject property was placed in the R-R Zone with the enactment of the 1954 comprehensive zoning of the area. Local Map Amendment Application E-990, filed in 1966 to rezone to the C-1 or C-2 Zone, was denied. In 1982, Sectional Map Amendment G-337 rezoned the land from the R-R Zone to the R-200 Zone. In 1997, the Upper Paint Branch Environmental Overlay Zone was placed upon a 525 square foot triangular portion of the northwest corner of the site by Sectional Map Amendment G-747, as discussed on pages 5-6, above.

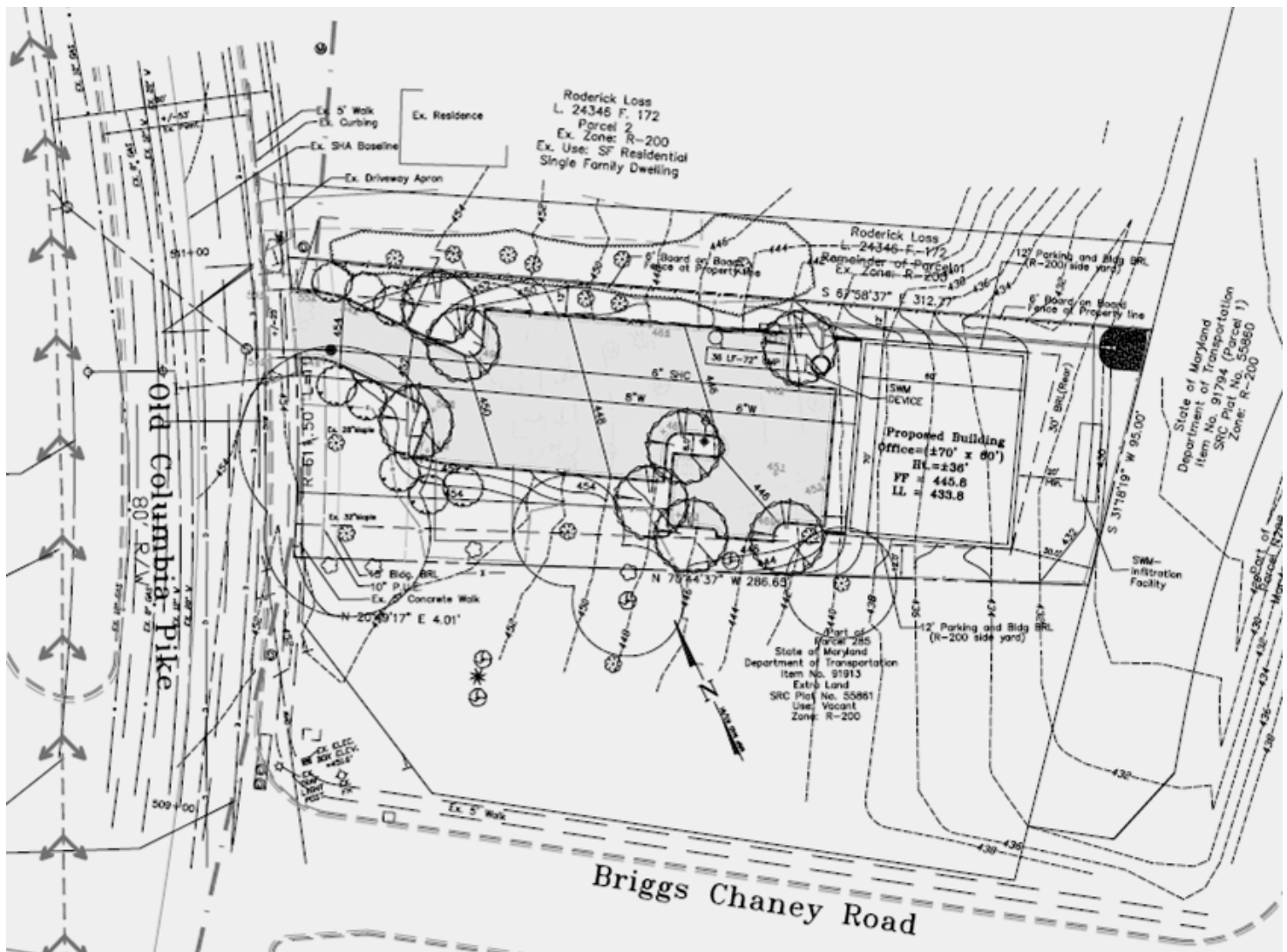
D. Proposed Use

The subject site is currently used as a residence and dental office. According to Dr. Rever, the layout of the rooms is not very efficient, and he needs more space for the operation of his practice. If the rezoning is approved, the plan is to demolish the current building and build another structure which will house his dental practice and some additional medical or general offices. The new structure will not serve as a residence. Tr. 13-15. Once in the new building, Dr. Rever may increase his staff from five to seven, and may rent out some of the office space.

Pursuant to Code § 59-H-2.52, the Applicant in this case has chosen to follow the “optional method” of application. The optional method requires submission of a schematic development plan that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if the

⁴ During the construction of Columbia Pike (US 29), the State of Maryland acquired a portion of the subject site’s rear yard and the neighboring parcel immediately to the south, creating two adjoining parcels held by the State of Maryland. Parts of those lots were used for the right-of-way.

rezoning is approved. The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a development plan amendment. The site layout from the revised SDP (Exhibit 33(a)) is reproduced below, and text is shown on the following page:



Binding Elements

The applicant proposes to reclassify the underlying zoning of the subject property from R-200 to an OM zone. The property will contain an Office Building with a mix of Medical Office and General Office uses. The actual tenant mix will be determined by market demand and available space for leasing. The development will be limited to that which can be supported by on-site parking spaces. The required parking will be determined using Section 59-E of the Montgomery County Zoning Ordinance. The site will be subject to the following binding elements:

- Building coverage will not exceed 20% of the Gross Tract Area.
- Building height will not exceed 36 feet
- The Floor Area Ratio (FAR) will not exceed 0.32

SITE DATA

SUBJECT PROPERTY: LOT 1 - PLAT #7000
PROPERTY ADDRESS: RHODES ADDITION TO FAIRLAND ACRES
TAX ACCOUNT NO.: 13915 OLD COLUMBIA PIKE
LOT AREA: 00276026
EXISTING ZONE: 29,893 S.F. OR 0.686 ACRES
PROPOSED ZONE: R-200
PROPOSED USE: OM
PROPOSED USE: MEDICAL OFFICE AND GENERAL OFFICE

DEVELOPMENT STANDARDS – OM ZONE

	<u>REQUIRED/ALLOWED</u>	<u>PROPOSED</u>
TRACT AREA	No Minimum	29,893 sf
BUILDING SETBACK REQUIREMENTS		
FRONT ADJACENT TO ARTERIAL PUBLIC R/W	13'	±198'
SIDE NORTH - S/F RESIDENTIAL	13' min / 25' sum	13'
SIDE SOUTH - S/F RESIDENTIAL	12' min / 25' sum	12'
REAR EAST - S/F RESIDENTIAL	30'	30'
MAXIMUM BUILDING HEIGHT	5 stories or 60'	36'
MAXIMUM BUILDING FLOOR AREA	1.5 or 44,839 sf	0.32 or 9,600 sf
MAXIMUM BUILDING COVERAGE	60% or 17,935 sf	Not to exceed 20%
PARKING SETBACK REQUIREMENTS		
FRONT ADJACENT TO ARTERIAL PUBLIC R/W	40'	40'
SIDE NORTH- S/F RESIDENTIAL	13' min / 25' sum	13'
SIDE SOUTH- S/F RESIDENTIAL	12' min / 25' sum	12'
REAR EAST- S/F RESIDENTIAL	30'	±/-100'
<u>OFF STREET PARKING AND LOADING</u>		
PARKING COMPOUND		9,200 sf
INTERNAL LANDSCAPING	5.0% or 460 sf	5.4% or 499 sf
PARKING SPACES		
Example #1 (60% General Office/ 40% Medical Practitioner)		
Required	±4,650 sf (General Office)	x 2.9 spaces per 1,000 sf = 13.50 spaces
	±3,500 sf (Medical Practitioner)	x 5.0 spaces per 1,000 sf = 17.50 spaces
	Total Parking Required (Total)	= 31 spaces
	Parking Provided	= 31 spaces
Example #2 (85% General Office/ 15% Medical Practitioner)		
Required	±8,100 sf (General Office)	x 2.9 spaces per 1,000 sf = 23.49 spaces
	±1,500 sf (Medical Practitioner)	x 5.0 spaces per 1,000 sf = 7.50 spaces
	Total Parking Required (Total)	= 31 spaces
	Parking Provided	= 31 spaces
	Handicapped Spaces Required/Provided	= 2 spaces
IMPERVIOUS AREA (Buildings and Parking) = ±/-13,500 sf or 45%		

The binding elements shown on the SDP limit the use of the site as follows:⁵

1. Building cover will not exceed 20% of the Gross Tract Area.
2. Building height will not exceed 36 feet.
3. The Floor Area Ratio (FAR) will not exceed 0.32.

The third binding element, limiting the FAR to 0.32 effectively limits the floor space in the building to 9,600 square feet, since the lot size is 29,893 square feet (*i.e.*, $9,600 / 29,893 = 0.32$). The limitations imposed by the Binding Elements will result in a smaller building and less intense use than permitted generally in the O-M Zone. Technical Staff notes that the O-M zone potentially allows up to a 44,839 square foot development with an FAR of 1.5. Similarly, the proposal calls for an office building measuring only 36 feet in height and covering only 20 percent of the lot, notwithstanding that the O-M Zone potentially allows up to 60 feet in building height and 60 percent building coverage on a lot. These self-imposed limitations were designed to keep the building scale compatible with other properties in the immediate area. Technical Staff, the Planning Board and the Hearing Examiner all agree that the Binding Elements will achieve that end in this case. A final executed copy of the Declaration of Covenants containing the Binding Elements has been filed in the record as Exhibit 31(a).

Applicant's land planner, Brian Donnelly, testified that the property will have a single point of access, an existing concrete driveway. Circulation will be down the center of the property heading straight toward the proposed building, which will be 70 feet by 60 feet, and located on the eastern (back) property line. Its precise location on the site, as well as the location of the parking, will be determined at site plan. The proposed development will have 31 parking spaces on site. Mr. Donnelly suggested that while locating the parking towards the front of the property may give a

⁵ Applicant had originally proposed a fourth binding element, which would have required the existing structure to remain as a "transitional need" to maintain the currently functioning dental practice during construction operations. It

more commercial appearance, that was consistent and compatible with the commercial parking located in front of the small shopping center diagonally across the street from the subject site. Tr. 31.

Technical Staff evaluated the parking alternatives offered by Applicant. The SDP provides two scenarios for the required number of parking spaces. In scenario 1, there will be a 60/40 split between general office and medical practitioner space provided: 4,650 square feet for general office use, and 3,500 square feet for medical practitioner use. This mix equates to 8,150 total square feet and would require 30 parking spaces. The Applicant meets the parking requirement for scenario 1 by proposing 31 spaces total.

In scenario 2, an 85/15 split between office and medical space, the Applicant proposes 8,100 square feet of general office and 1,500 square feet of medical practitioner space (most likely only enough space to provide for the Applicant's existing dental practice). The mix in scenario 2 totals 9,600 square feet and requires 31 total parking spaces, which again is met because the Applicant is proposing 31 total spaces. Scenario 1 proposes an office building that would be 1,450 square feet smaller than the building proposed in scenario 2.

Technical Staff found "the building square footage in either scenario acceptable, as a building of 9,600 square feet or less will result in a moderate office building that Staff finds acceptable in size, scale, and scope." Exhibit 22, pp. 16-17.

E. The Master Plan

The property is located within the area covered by the Fairland Master Plan, approved and adopted in 1997. The subject property is located at the southernmost edge of the Perrywood community. The Perrywood community is described on pages 57-59 of the Master Plan, but the Plan focuses on the Briggs Chaney area on pages 63-65. Technical Staff states that Perrywood is a

was removed because Technical Staff felt that it would serve as a barrier to attaining the best layout on the site.

transition area between the higher density area to the south and the residential wedge to the north.

The key transition occurs north of the subject property, so the site falls within the higher density area of Perrywood.

As mentioned earlier, the subject site is diagonally across from the Briggs Chaney Shopping Center, a neighborhood retail area containing 41,000 square feet of retail space, professional services and restaurants. The subject property's dental office is included in the Master Plan's description of the Briggs Chaney retail area: "There are a few local services: a day care center ... and a dentist's office." Master Plan, p. 63.

The Master Plan encourages:

"compatible and transitional land uses between retail and residential uses. . . . There are few medical offices or professional services in the immediate area. Single practitioners and small-scale office uses ... may be appropriate to serve the residential communities. [Master Plan, p. 65]

Technical Staff found that the proposed development, limited to a maximum of 9,600 square feet and a height of 36 feet, is small in scale, as called for in the Master Plan. "The proposed development is compatible with the surrounding area and consistent with the recommendations of the Fairland Master Plan." Exhibit 22, p. 11. The Planning Board agreed. Exhibit 23. Applicant's land planner, Brain Donnelly, also testified that the proposed use is consistent with the 1997 Fairland Master Plan. Mr. Donnelly opined that that language supports the proposed use in that this is a transition area use between the multi-family residential area to the south and the single-family area to the north, while still supporting the commercial core. Mr. Donnelly characterized the O-M Zone as "a real appropriate zone for this particular site because it's a medium to low intensity use," especially as it has been limited under the Optional Method. Tr. 39.

For the reasons stated by Technical Staff and Mr. Donnelly, the Hearing Examiner finds that the proposed use will be consistent with the 1997 Fairland Master Plan.

F. Public Facilities

Technical Staff reviewed the public facilities serving the subject site and found no adverse effects from the proposed use. Exhibit 22, pp. 11-12. The school system will not be affected because the proposed use will be non-residential. As to water and sewer services, the Washington Suburban Sanitary Commission (WSSC) found that the reclassification from the R-200 zone to the O-M zone and the subsequent proposed development would not have an adverse impact. According to Applicant's land planner, Brian Donnelly, the site presently is on a septic system, but its water and sewer categories are classified as W1 and S1, and these public facilities are both available under Old Columbia Pike, adjacent to the site, so Applicant may connect in directly based on the existing categories. Mr. Donnelly also noted that electric, telephone and gas utilities are also available under Old Columbia Pike, a firehouse is immediately to the west and there is a police substation in Briggs Chaney Shopping Center on the east side of Route 29 and Briggs Chaney Road. Tr. 33.

With regard to transportation facilities, Applicant produced testimony (Tr. 49-57) and a traffic statement (Exhibit 20(b)) from Carl Starkey, a traffic engineer and transportation planner. Mr. Starkey testified that he evaluated site in accordance with the Local Area Transportation Review (LATR) Guidelines and determined that it would generate a maximum of 23 trips during the evening peak hour, including the existing trips generated by the present practice. During the morning peak hour, the use will generate a total of 15 trips. This evaluation was based on an assumption of 3500 square feet of medical office space and 4600 square feet of general office space. Only the general office space will generate new trips (6 in the morning peak hour and 10 in the evening peak hour) since the existing dental office space is already generating trips. Because the use, overall, would generate fewer than 30 peak hour trips in either peak hour, a traffic study was not required to comply with LATR.

Technical Staff accepted these findings, and concluded that a comprehensive traffic study was not required.⁶ Exhibit 22, pp. 11-12. Transportation Planning Division added that “there is a reasonable probability that public facilities and services will be found adequate to serve the proposed development under the Growth Policy when the subject application is submitted for APF review at the time of Site Plan. Exhibit 34, p. 2.

Both Technical Staff and Mr. Starkey assumed that the 2007-2009 Growth Policy test for Policy Area Management Review (PAMR) would apply to this case, requiring Applicant to mitigate 45 percent of its new trips in the Fairland/White Oak Policy Area. Applicant is proposing to mitigate peak-hour trips by using flex time schedules for staff, patient appointments scheduled outside of business peaks, and/or a bus shelter. The Hearing Examiner concludes that PAMR does not apply to this application. After Technical Staff had filed its report, the Council, on February 26, 2008, adopted Zoning Text Amendment (ZTA) 07-17 (Ordinance No. 16-14, effective March 17, 2008). The Hearing Examiner takes official notice of that enactment. Under ZTA 07-17, Section 2, rezoning applications must “demonstrate a reasonable probability that available public facilities will be adequate to serve the proposed development under the Growth Policy standards in effect when the application is submitted.” [Emphasis added.]

Since the application in this case was filed on October 1, 2007, and the new Growth Policy did not become effective until November 15, 2007, it is the old Growth Policy which governs this rezoning application. PAMR was not a part of the old Growth Policy, and therefore this application is not required to comply with it. Moreover, this project will not have to go through subdivision, and thus the new Growth Policy will not be involved at that stage. In any event, these issues will be

⁶ Technical Staff also noted that the site is served by Metrobus route Z9.

reviewed at Site Plan, and Applicant's counsel indicated that Applicant would take steps to mitigate the new trips, if required to do so. Tr. 53.

Mr. Starkey further testified that the site would have safe and efficient access for both vehicular and pedestrian traffic. There are sidewalks on Old Columbia Pike which serve as a pedestrian path to the Paint Branch High School. Applicant will be using the existing access driveway for the site, and the larger parking area will have greater circulation than exists today, so it will be safe in the future. As noted by Technical Staff, after requiring the Applicant to submit a sight-distance study, DPWT found the location of the proposed driveway to be acceptable for vehicles traveling to and from the subject property. Exhibits 22, p.12, and 31(i).

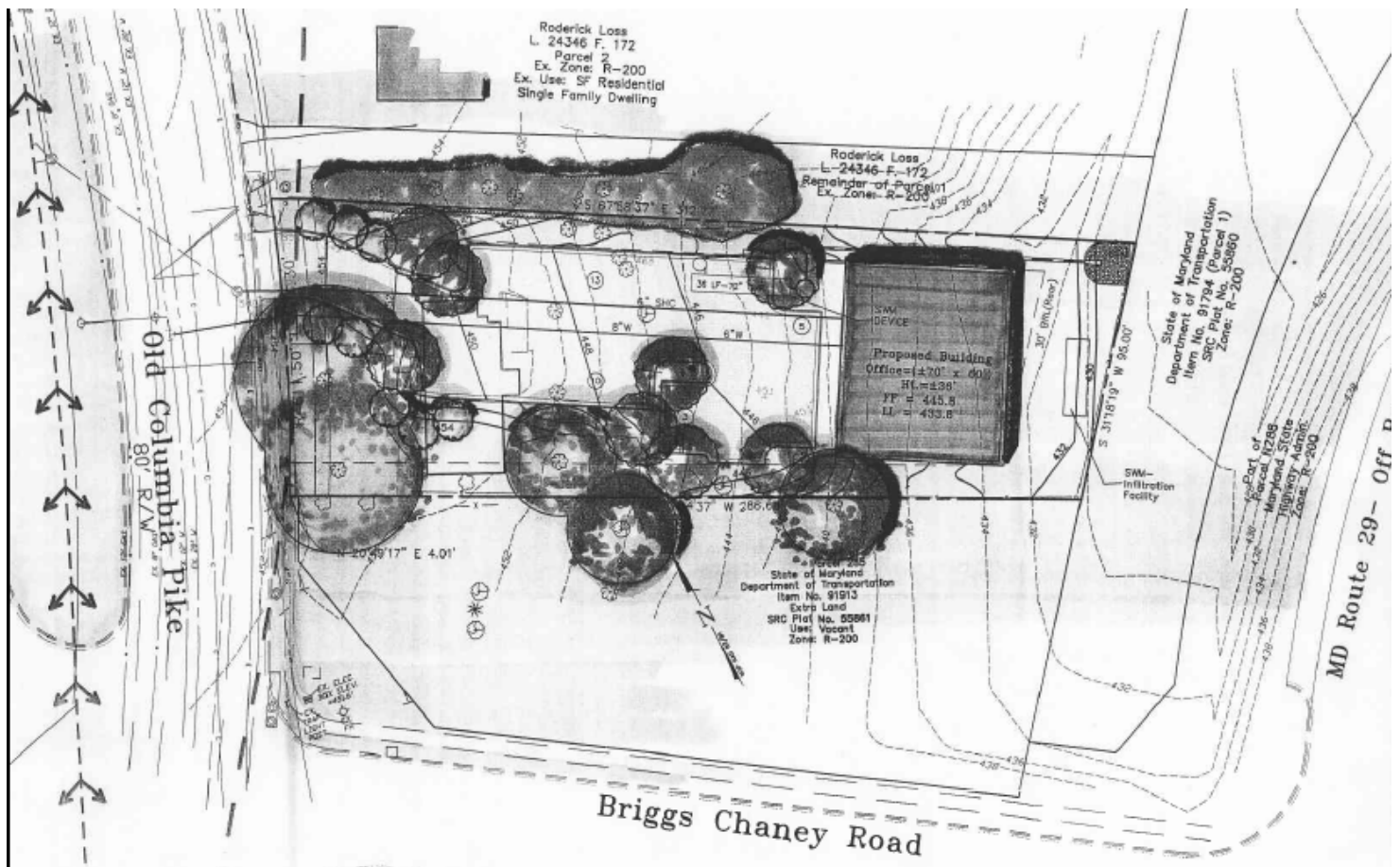
In Mr. Starkey's opinion, the expansion of the use on this site will not create any burden on the transportation public facilities since, for the immediate future, there is adequate capacity in the area. Based on the evidence of record, the Hearing Examiner concludes that the proposed use will not put an undue burden on public facilities.

G. Environment and Stormwater Management

As mentioned earlier in this report, the site has no streams, wetlands, forests or floodplains. Technical Staff approved Applicant's Natural Resources Inventory/Forest Stand Delineation (NRI/FSD) on September 4, 2007. Exhibit 7(a). On the same date, an exemption from the County's Forest Conservation Law was granted, pending a submission of an acceptable Tree Save Plan. Exhibit 8(a). Applicant has submitted a preliminary Tree Save Plan (Exhibits 31(f) and (g) and 33(b)), and Environmental staff has preliminarily deemed the Tree Save Plan feasible, noting that a final, more detailed Tree Save Plan will be required at the time of Site Plan review.

As can be seen on the NRI/FSD, there are three specimen trees on-site, with two more specimen trees off-site, one close to the northern property line and the other close to the southern

property line. There are also a number of other significant trees in and around the site. Applicant would like to two preserve two large maple trees (designated Significant Tree #1 and Specimen Tree #2 on the NRI/FSD), located along the property frontage, but their fate will be determined at site plan review.⁷ These trees and other vegetation on site are depicted on a rendered site plan submitted by Applicant at the hearing (Exhibit 28):



As discussed in Part III. A. of this report, county zoning maps indicate that a small portion of the northwest corner of the property (525 square feet) is within the Environmental Overlay Zone

⁷ Applicant's attorney, David Freishtat, observed that the environmental people (at M-NCPPC) want to retain the trees, but the site planners (at M-NCPPC) want to move the building as close to the street as possible, which would preclude the trees from remaining. Tr. 26.

as shown, but DPS determined that it is not within the SPA. Exhibit 31(j). In this regard, Technical Staff states (Exhibit 22, p. 13):

The location of the Special Protection Area Watershed Drainage Boundary is based upon a detailed topography analysis and is subject to confirmation by DPS. Staff has received electronic correspondence from DPS indicating that no portion of the subject property is within the Upper Paint Branch Special Protection Area and that the entire property appears to drain away from the Special Protection Area. This statement corresponds with the location of the drainage divide as shown on the applicant's schematic development plan.

Thus, it appears that restrictions specified in the Overlay Zone (an eight percent imperviousness limit) may not apply to this site; however, even if they do apply to new development on the northwest corner of the site, no new development will occur on this portion of the property because the existing driveway in this area will also be used for access to the future office building.

A stormwater management concept plan (Exhibit 33(d)) was filed with Technical Staff and DPS. It has not yet been approved by DPS, but according to Applicant's land planner, Brian Donnelly, Applicant has revised it in accordance with DPS instructions by adding an underground pipe farm in the front. Applicant will be providing water quality and water quantity management on site, and there will be underground storage pipe to treat quantity control. Water quality control will be through a hydrodynamic device which will treat the quality discharge. The outfall would be along the northeast boundary, discharging into an existing open ditch that parallels the off ramp from Route 29. Tr. 44-45.

Technical Staff observed that because the ground water recharge system is shown at the rear of the site, the design does not appear to conflict with the tree save measures supplied by the Applicant. As such, "Staff does not believe that there will be any prohibitions to proposed underground facilities for an office use." Exhibit 22, p. 13. The final determination as to the adequacy of the stormwater management concept plan will be made by DPS.

H. Community Participation

There was no direct community participation in this case except for the request of the abutting neighbor to the north, Roderick Loss, for a privacy fence on the property line. Exhibit 24. Dr. Rever testified that he met with Mr. Loss, and he didn't have negative comments, but wanted the aforementioned privacy fence. Applicant has included one on his revised SDP. Dr. Rever also met with Patrick Zilliacus who is a representative of the Avonshire townhouse community, and he was amenable to this type of a small office structure, as was Stuart Rochester of the Fairland Civic Association. Tr. 12-13.

IV. SUMMARY OF THE HEARING

Applicant called three witnesses at the hearing, Brian J. Donnelly, an expert in site planning and land planning; Carl Starkey, an expert in traffic engineering and transportation planning; and himself. There were no opposing witnesses.

1. David Rever (Tr. 8-15):

David Rever testified that he is a dentist who owns the subject site. He bought the property in 1986 as a residence and dental office. He described the home as a typical, small, brick, early '60s ranch house. It is the only structure on the lot.

Dr. Rever also described the surrounding area. He is in close proximity the Route 29 off ramp, Briggs Chaney Road, and Old Columbia Pike. One step beyond that, on the other side of Route 29, is a large shopping center. On the north side of the site, there are some much older homes, and those are being rented. Across Old Columbia Pike is the Burtonsville Fire Station, and diagonally across the street there is another shopping center, a smaller shopping center with a Pizza Hut as the anchor. On the south, across Briggs Chaney Road, there is a group of townhouses, the Avonshire Development. Immediately to the south and east, there used to be small houses which

were acquired by Maryland State Highway Administration and demolished to put the interchange in for Route 29.

The home is currently used as a residence and dental office, and parking is located to the front (north) and west side of the building. According to Dr. Rever, the layout of the rooms is not very efficient, and he needs more space for the operation of his practice. If the rezoning is approved, the plan is to demolish the current building and build another structure which will house his dental practice and some additional medical or general offices. The structure will not serve as a residence.

Dr. Rever further testified that he met with the neighbor directly to the north, Roderick Loss, and he didn't have negative comments, but wanted a privacy fence on the property line. He also met with Patrick Zilliacus who is a representative of the Avonshire townhouse community, and he was amenable to this type of a small office structure, as was Stuart Rochester of the Fairland Civic Association.

Once in the new building, Dr. Rever may increase his staff from five to seven, and may rent out some of the office space.

2. Brian J. Donnelly (Tr. 15-49):

Brian J. Donnelly testified as an expert in site planning and land planning. Using a rendered Surrounding Area map (Exhibit 26), Mr. Donnelly described the surrounding area. Immediately to the north is Parcel 232, which is a residence; to the west is Old Columbia Pike and a firehouse across the street; to the east is the off-ramp for Route 29; to the south is the residue of Lot 285. A portion of that lot was taken for the improvements of Briggs Chaney Road, and what is left is a small strip between the right-of-way and the subject property that is unused and vacant. Thus, the site has state-owned land on three sides. Immediately to the south, beyond Briggs Chaney Road, is

the Avonshire townhouse development, and on the quadrant diagonally across this main intersection of Old Columbia Pike and Briggs Chaney is a small commercial shopping center.

Mr. Donnelly noted that Technical Staff had identified the neighborhood and study area as bounded on the north by Paint Branch High School; on the east by Route 29; on the south by the southern limits of the townhouse parallel to Martinelli Drive; and on the west by the centerline of Old Columbia Pike. The staff's designation is shown on Exhibit 26 by large dashed lines with the dots. Mr. Donnelly opined that the surrounding area definition should have included the firehouse and strip mall on the west side of Old Columbia because the Master Plan identified this intersection as "kind of a core central development area." Tr. 22. He added a dashed line to Exhibit 26 to show this added area.

[Applicant's attorney, David Freishtat, noted that he had been informed by Technical Staff that Paint Branch High School, which is within the surrounding area to the north, may be planning an expansion into neighboring Parcels 140 and 75, which are owned by the Planning Commission. Tr. 23-24.]

Mr. Donnelly color coded Exhibit 26 to demonstrate that "there is a fairly intense use, and th[at] compatibility within the study area that Park and Planning has identified is primarily multi-family and institutional uses, commercial uses." Tr. 25. The uncolored areas within the surrounding area are single-family residential uses.

Mr. Donnelly also introduced a rendered version of the schematic development plan (SDP), Exhibit 28, to describe the site and its immediate environs. Immediately to the west of the property is Old Columbia Pike. It has a 180 foot right of way recently built out to its full dedication during the improvements of Briggs Chaney and Route 29. Immediately to the south, a small triangular shaped parcel is the residue parcel owned by the State Highway Administration. Immediately to the

north is a single-family residential lot. There is an existing evergreen vegetative strip between the two parcels that separates Dr. Rever's property from the driveway accessing the residential lot next door. The owner of that lot has requested a six-foot privacy fence, which is allowable under the Zoning Ordinance.

On Exhibit 28, the existing vegetation is the darker vegetation to the north and the large circular areas to the south and immediately to the west. There are two large maple trees between the existing parking lot of Old Columbia Pike, which Applicant will try to retain through the site plan process. [Mr. Freishtat observed that the environmental people (at M-NCPPC) want to retain the trees, but the site planners (at M-NCPPC) want to move the building as close to the street as possible, which would preclude the trees from remaining. Tr. 26.]

Mr. Donnelly further testified that Applicant had filed a natural resource inventory that's been approved by Montgomery County. It notes that there are no stream valley buffers, no flood planes, and no other environmental constraints that would impose any constraints on the development. There is also no existing forest on site, and a forest conservation exemption and has been granted by Park and Planning staff based on the size of the parcel and the fact that there are no environmental constraints or existing forest on site.

According to Mr. Donnelly, the Zoning Map for the area indicates that the Upper Paint Branch Special Protection Area (SPA) intrudes into a small triangular slice of the site, along the northwest side of the property, running parallel to Old Columbia Pike. It is shown on the SDP by a dark dashed line. However, based on the actual drainage divide for the area, which is on the opposite side of Old Columbia Pike, the true delineation of the SPA is not on the subject site. The actual drainage divide is shown on the SDP as a dark dashed line with dual arrows pointing down. It delineates the actual water flow into the special protection area. Mr. Donnelly indicated that

Mark Etheridge of DPS sent Applicant a memo which states that the SPA does not extend into the subject site because the drainage divide should be determined by field conditions. A copy will be supplied for the record.

Mr. Donnelly testified that the property will have a single point of access, an existing concrete driveway. Circulation will be down the center of the property heading straight toward the proposed building, which will be 70 feet by 60 feet, and located on the eastern (back) property line. Its precise location on the site, as well as the location of the parking, will be determined at site plan. The proposed development will have 31 parking spaces on site. Mr. Donnelly suggested that while locating the parking towards the front of the property may give a more commercial appearance, that was consistent and compatible with the commercial parking located in front of the small shopping center diagonally across the street from the subject site.

According to Mr. Donnelly, the site presently is on a septic system, but its water and sewer categories are classified as W1 and S1, and these public facilities are both available under Old Columbia Pike, adjacent to the site, so Applicant may connect in directly based on the existing categories. Public electric, telephone and gas are also available under Old Columbia Pike. The firehouse is immediately to the west, and there is a police substation in Briggs Chaney Shopping Center on the east side of Route 29 and Briggs Chaney Road. The site is also served by a public bus.

The lot is already recorded, so subdivision will not be required, though site plan review by the Planning Board will be required. The building's height is planned for 36 feet, with a floor area of about 10,462 square feet. Applicant would like to get a second physician to rent space, if possible, but whatever tenants come up during the development process would dictate whether a

portion of the building will have a general office use or a professional office use. The required parking was calculated accordingly on the SDP.

Mr. Donnelly further testified that the proposed use is consistent with the 1997 Fairland Master Plan. This particular parcel falls into the Perrywood study area. As described on page 57 of the plan, this area makes a transition between the residential wedge to the north and the suburban communities to the south and east. Mr. Donnelly opined that that language supports the proposed use in that this is a transition area use between the multi-family residential use to the south and the single-family use to the north, while still supporting the commercial core. The subject dentist's office is mentioned on page 63 of the Plan. While the Master Plan does not specifically recommend rezoning to the O-M Zone, on page 65, the Plan "encourage[s]" compatible and transitional land uses at the edges between the retail and residential uses. It specifically notes that single practitioners and small-scale office uses, like those permitted through special exceptions, may be appropriate to serve the residential communities. Mr. Donnelly characterized the O-M Zone as "a real appropriate zone for this particular site because it's a medium to low intensity use," especially as it has been limited under the Optional Method. Tr. 39.

Mr. Donnelly then described the requirements of the O-M Zone. Section 59-C-4.31 of the Zoning Ordinance lists four components for the O-M Zone. It must be outside the central business district; located in an area where high intensity uses are not appropriate; where moderate intensity office buildings will have no adverse impact on adjoining neighbors; and where the area is not predominantly single-family in character. Mr. Donnelly opined that the subject site meets those criteria. Moreover, Applicant has proposed Binding Elements that will limit the intensity of the use, with building coverage limited to 20%, when 60% is permitted; height limited to 36 feet, when 60 feet is permitted; and density limited to 0.32 FAR when 1.5 FAR is permitted. According to Mr.

Donnelly, parking will be adequate for either general office or medical office use, though the latter requires more parking per square foot of office space.

Mr. Donnelly further testified that the existing storm water management area is on the east side of the building, between within the 30 foot building restriction line and the Route 29 off ramp. A concept storm water management plan has been submitted to DPS for its review. It has not yet been approved, but Applicant has revised it in accordance with DPS instructions by adding an underground pipe farm in the front. Applicant will be providing water quality and water quantity management on site, and there will be underground storage pipe to treat quantity control. Water quality control will be through a hydrodynamic device which will treat the quality discharge. The outfall would be along the northeast boundary, discharging into an existing open ditch that parallels the off ramp from Route 29.

Mr. Donnelly concluded that the proposed use would be in conformity with the laws of Montgomery County and the State of Maryland, compatible with the surrounding properties and uses and in the public interest by allowing Applicant to expand a service to the community. He stated that the use would be compatible because the neighborhood is primarily multi-family, institutional and commercial. It is compatible with the single-family residences because there's a minimum amount of traffic generated by the use; it a very low intense use as a commercial office building; it is a good transitional use between the single-family residences and the intense development to the south and west (multi-family residential townhouses, the institutional use across the street, and the commercial to the southwest corner); and it fits in "like a neighborhood character kind of office building." Tr. 48.

3. Carl Starkey (Tr. 49-57):

Carl Starkey was called by Applicant as an expert in traffic engineering and transportation planning. He testified that he evaluated site in accord with the Local Area Transportation Review Guidelines and determined that it would generate a maximum of 23 trips during the evening peak hour, including the existing trips generated by the present practice. This was based on 3500 square feet of medical office space and 4600 square feet of general office space. Because it would generate fewer than 30 peak hour trips, a traffic study was not required, and he filed the brief traffic statement as Exhibit 20(b).

He noted that the Planning Board and the County Council have instituted a new review called Policy Area Management Review (PAMR), under which Applicant would be required to mitigate 45 percent of the new trips. In this case, that would be a maximum of 10 new trips generated by the general office use in the evening peak hour (6 new trips are generated in the morning peak hour), as set forth in Table A of Exhibit 20(b). Applicant is proposing to mitigate peak-hour trips by using flex-time schedules for staff and appointments scheduled outside of business peaks. Also being considered is providing a bus shelter.

[The Hearing Examiner noted that PAMR might not apply to this case because a Zoning Text Amendment was adopted which makes the applicable growth policy to special exceptions and zoning applications that which was in effect when the application was filed. Applicant's counsel was aware of the ZTA and indicated that Applicant would take steps to mitigate if required.]

Mr. Starkey further testified that the site would have safe and efficient access for both vehicular and pedestrian traffic. There are sidewalks on Old Columbia Pike which serve as a foot path to the Paint Branch High School, along this corridor. Applicant will be using the existing access driveway for the site, and a larger parking area will have greater circulation than exists

today, so it will be safe in the future. [Applicant's counsel noted that he had an email from DPWT, finding that the sight distances were adequate, and he will supply a copy for the record.]

In Mr. Starkey's opinion, this expansion of the use on this site will not create any burden on the transportation public facilities since, for the immediate future, there is adequate capacity in the area.

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term "Euclidean" zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building heights.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating to the Council that the proposed development will be consistent with the purpose and regulations of the proposed zone and compatible with the surrounding development, as required by the case law, *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1967). The new zone must also be consistent with a coordinated and systematic development of the regional district and in the public interest, as required by the *Regional District Act, Maryland-National Capital Park and Planning Commission Article (Art. 28)*, Md. Code Ann., § 7-110.

Montgomery County has many floating zones, including the O-M Zones. The O-M Zone contains development standards and a post-zoning review process that generally delegate to the

Planning Board the details of site specific issues such as building location, stormwater control, vehicular and pedestrian routes, landscaping and screening. The Council has a broader and more discretionary role in determining whether to approve a rezoning.

When the reclassification sought by an applicant is recommended by the applicable Master Plan, approval of the rezoning by the Council requires an affirmative vote of 5 Council members; however, when the Master Plan does not recommend the reclassification sought, the Zoning Ordinance requires an affirmative vote of 6 members of the Council for approval, unless the Planning Board has recommended approval. Zoning Ordinance §59-H-8.2(b). As mentioned earlier, the 1997 Fairland Master Plan does not specifically recommend the O-M Zone for the subject site, but the Planning Board did recommend approval, and therefore a simple majority of 5 members of the Council is required for approval pursuant to Zoning Ordinance §59-H-8.2(b).

We return now to the three areas of Council review discussed above, the purpose and requirements of the zone, compatibility with land uses in the surrounding area, and relationship to the public interest.

A. The Purpose Clause and the Zone's Requirements

The purpose clause for the O-M Zone, Zoning Ordinance §59-C-4.310, provides:

It is the purpose of the O-M zone to provide locations for moderate-intensity office buildings in areas outside of central business districts. It is intended that the O-M zone be located in areas where high-intensity uses are not appropriate, but where moderate intensity office buildings will not have an adverse impact on the adjoining neighborhood. This zone is not intended for use in areas which are predominantly one-family residential in character.

The fact that an application complies with all specific requirements and purposes set forth herein shall not be deemed to create a presumption that the application is, in fact, compatible with surrounding land uses and, in itself, shall not be sufficient to require the granting of any application.

The first and second criteria are clearly met in this case because the subject site is located outside of a central business district and is in a residential/light commercial/institutional area where high intensity uses would not be appropriate. As to the third criterion, Applicant's land planner, Technical Staff and the Planning Board all agree that a moderate-intensity office building will not have an adverse impact on the adjoining neighborhood, especially given the limits on intensity of the use contained in the Binding Elements. The Binding Elements restrict building coverage to 20%, though 60% is permitted in the O-M Zone; restrict height to 36 feet, though 60 feet is permitted; and restrict density to 0.32 FAR though 1.5 FAR is permitted.

The Hearing Examiner agrees that there will be no adverse impact upon the adjoining neighborhood because the intensity of the use will be strictly limited by the binding elements. Moreover, the site is located along three major roads, and is directly across from a fire house and a shopping center, which render the immediate area predominantly commercial/institutional, rather than single-family residential, in spite of its current zoning. In sum, the proposed rezoning will satisfy the four requirements of the purpose clause.

The development standards for the O-M Zone are spelled out in Zoning Code Sections 59-C-4.311 through 314. They were set forth by Technical Staff in a Table on pages 15-16 of their report:

Development Standard	Required	Provided	Applicable Zoning Provision
Maximum Building Coverage	Shall not exceed 60%	The Building coverage will not exceed 20%	§ 59-C-4.311(a)(1)
Building Height	5 Stories or 60'	Will not exceed 36'	§ 59-C-4.311(a)(2)
Minimum Green Area	At least 10%	55%	§ 59-C-4.311(a)(3)
Floor Area	Shall not exceed FAR 1.5	The FAR will not exceed 0.32	§ 59-C-4.312

Building Setback from any street right-of-way shown on a master plan (<i>here, the building fronts on Old Columbia Pike, a master-planned road</i>)	15'	Will not be less than 15'	§ 59-C-4.313(a)
Building Setback from all other Lot Lines	If the adjoining lot is in a residential zone and is not recommended for commercial or industrial zoning on a master plan, 1' for each 3' of building height (<i>here, adjoining lot is R-200, which makes the standard 12'</i>)	<ul style="list-style-type: none"> • 12' from southern side lot line • 12' from northern side lot line • 30' from eastern rear lot line 	§ 59-C-4.313(b)(2)
Parking Setback	<ul style="list-style-type: none"> • Front: 40' • Side: 12' (Sum of both: 25') • Rear: 30' 	<ul style="list-style-type: none"> • Front: Will not be less than 40' • Side: 13' from northern side lot line; 12' from southern lot line; sum of both is 25' • Rear: Will not be less than 30' 	§ 59-E-2.81(a)
Required Number of Parking Spaces	<ul style="list-style-type: none"> • Medical or Dental Clinic: 5 spaces from each 1,000 sf • General Office: 2.9 spaces for each 1,000 sf • Total: 30 or 31 depending of the tenant mix 	<ul style="list-style-type: none"> • Two different examples of parking are shown based on tenant mix. However, both examples have the required number of spaces. 	§ 59-E-3.7
Internal Landscaping of Surface Parking Facility	Minimum of 5%	5.4%	§ 59-E-2.73

As is evident, the application meets all the specific requirements of the O-M Zone. Moreover, in addition to the local map amendment procedures, the proposed use of the subject property will

require a later approval of a site plan by the Montgomery County Planning Board, as set forth in Division 59-D-3 of the Zoning Ordinance.

B. Compatibility

Compatibility has generally been evaluated in terms of land use, density, height and bulk. The evidence indicates that the proposed use will be compatible with existing and planned development within the surrounding area. The property is currently being used as a dental office, as recognized by the Fairland Master Plan. The proposed use would be compatible because, as noted above, uses in the immediate neighborhood are primarily multi-family, institutional and commercial. Land use compatibility for the intended dental practice and small office use is further evidenced by the Master Plan's call for "Single practitioners and small-scale office uses" in the area (Page 65).

As testified to by Applicant's land planner, the proposed use would be compatible with the single-family residences because a minimum amount of traffic would be generated by the use; it would be a very low intensity use as a commercial office building; it would be a good transitional use between the single-family residences and the intense development to the south and west (multi-family residential townhouses, the institutional use across the street, and the commercial use to the southwest corner);⁸ and it would fit in "like a neighborhood character kind of office building." Tr. 48.

The density, height and bulk of the proposed use have all been severely limited by the binding elements. Technical Staff expressly found that "an office building at this moderate size and scale is appropriate for the site and is not detrimental to the surrounding area." Exhibit 22, p. 9.

Based on this record, the Hearing Examiner finds that the proposed use would be compatible with the surrounding area. The Planning Board will also evaluate compatibility at the site plan

⁸ In this context, it should be recalled that another rezoning application (G-848, filed by Olympus Real Estate Group, LLC) is pending, and it seeks to rezone the three lots immediately to the north of the site (Lots 232, 200, & 146) to allow townhouse development (RT-8). If that application is granted, it would remove a large portion of the remaining single-family, detached uses from the block.

stage, and that post-zoning review provides an additional safeguard against any incompatible development.

C. Public Interest

Maryland law requires that any rezoning be in the public interest. As stated in the State Zoning Enabling Act applicable to Montgomery County, all zoning power must be exercised:

“... with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

Factors which are usually considered in determining the public interest include Master Plan conformity, the recommendations of the Planning Board and its staff and possible adverse effects on the surrounding area, public facilities and the environment.

1. Master Plan Conformity, Technical Staff and the Planning Board:

For the reasons discussed in Part III. E. of this report, the proposed rezoning is consistent with the Fairland Master Plan, approved and adopted in 1997. The Master Plan encourages:

“compatible and transitional land uses between retail and residential uses. . . There are few medical offices or professional services in the immediate area. Single practitioners and small-scale office uses ... may be appropriate to serve the residential communities. [Master Plan, p. 65]

Technical Staff found that the proposed development, limited to a maximum of 9,600 square feet and a height of 36 feet, is small in scale, as called for in the Master Plan. “The proposed development is compatible with the surrounding area and consistent with the recommendations of the Fairland Master Plan.” Exhibit 22, p. 11. The Planning Board agreed (Exhibit 23), as does the Hearing Examiner.

In any event, compliance with Master Plan recommendations is not mandatory in this case because the O-M Zone does not require it; rather, the courts have held that the Master Plan should be treated only as a guide in rezoning cases like this one. See *Richmarr Holly Hills, Inc. v. American PCS, L. P.*, 117 Md. App. 607, 635-636, 701 A.2d 879, 893, n.22 (1997). As mentioned in Part III. E. of this report, while the Master Plan may not specifically recommend this rezoning, it would be consistent with its objectives.

Accordingly, the Hearing Examiner concludes, based on a preponderance of the evidence, that the rezoning will be consistent with the 1997 Fairland Master Plan.

2. Public Facilities and the Environment:

The Transportation Planning staff reviewed the rezoning application and found that it meets all requirements of Local Area Transportation Review, as discussed in Part III. F. of this report. Based on the application of appropriate trip generation rates, the proposed use will generate fewer than 30 weekday peak-hour trips, and therefore a detailed traffic study is not needed. Policy Area Mobility Review does not apply to this application for reasons discussed on page 16 of this report. As mentioned earlier, the record also supports the conclusion that other public facilities will not be adversely affected by the proposed use.

Environmental issues were discussed in Part III. G. of this report. As mentioned there, a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) has been approved for the subject property (Exhibit 7(a)), and an exemption from the County's Forest Conservation Law was granted, subject to a Tree Save Plan which has been filed (Exhibit 33(b)).

A stormwater management concept plan (Exhibit 33(d)) was filed with Technical Staff and DPS. It has not yet been approved by DPS, but according to Applicant's land planner, Brian Donnelly, Applicant has revised it in accordance with DPS instructions by adding an underground

pipe farm in the front. Technical Staff indicated that it does “not believe that there will be any prohibitions to proposed underground facilities for an office use.” Exhibit 22, p. 13. Based on the documentation submitted by Applicant (Exhibits 33(d) and (e)), Mr. Donnelly’s testimony and Technical Staff’s comments, the Hearing Examiner finds it reasonably probable that a stormwater management plan will be approved for the project. In any event, DPS approval will be required prior to Site Plan review.

As discussed in Parts III. A. and G of this report, County zoning maps indicate that a small portion of the northwest corner of the property (525 square feet) is within the Environmental Overlay Zone; however, DPS determined that it is not actually within the Special Protection Area based on the location of the drainage divide. Exhibit 31(j). *See also*, the Technical Staff report, Exhibit 22, p. 13. Thus, it appears that restrictions specified in the Overlay Zone (an eight percent imperviousness limit) may not apply to this site; however, even if they do apply to new development on the northwest corner of the site, no new development will occur on this portion of the property because the existing driveway in this area will also be used for access to the future office building. Thus, the evidence indicates that the proposed zoning will not likely have an adverse impact on public facilities or the environment.

In sum, the proposed use will not adversely affect surrounding development, is consistent with the goals of the Master Plan, will continue to provide a useful health service to the community, will not adversely affect public facilities or the environment and has been approved by Technical Staff and the Planning Board. The Hearing Examiner therefore finds that its approval would be in the public interest.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions with respect to Application G-874:

1. That the requested reclassification to the O-M Zone complies with the requirements of the O-M Zone and its purpose clause;
2. That the requested reclassification to the O-M Zone will be compatible with existing and planned land uses in the surrounding area; and
3. That the requested reclassification to the O-M Zone bears sufficient relationship to the public interest to justify its approval.

VII. RECOMMENDATION

I, therefore, recommend that Zoning Application No. G-874, seeking reclassification from the R-200 Zone to the O-M Zone of 29,893 square feet (0.68 acres) of land known as Lot 1 of the Rhodes Addition to Fairland Subdivision, located at 13915 Old Columbia Pike, Silver Spring, Maryland, in the 5th Election District, be approved in the amount requested and subject to the specifications and requirements of the Schematic Development Plan, Exhibit 33(a); provided that the Applicant submits to the Hearing Examiner for certification a reproducible original and three copies of the Schematic Development Plan within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance, and provided that the Declaration of Covenants (Exhibit 31(a)) is filed in the County land records in accordance with § 59-H-2.54 of the Zoning Ordinance.

Dated: April 2, 2008

Respectfully submitted,

Martin L. Grossman
Hearing Examiner